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BEFORE THE

Federal Communications Commission

MAY 20 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

)

File No. BPH-911115MG

)

GARY E. WILLSON

)

File No. BPH-911115MO

)

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, California

)

)

)

TO: The Honorable Edward Luton
Administrative Law Judge

**REPLY TO OPPOSITION TO
PETITION TO ENLARGE ISSUE**

Gary E. Willson (Willson) pursuant to Rule 1.229 files this Reply to the Opposition to Petition to Enlarge Issues filed by Moonbeam, Inc. (Moonbeam). Willson seeks misrepresentation and/or lack of candor issues against Moonbeam for false and misleading information in Moonbeam's application, as amended, and in its Integration and Diversification Statement. In its Opposition

A. Local Residency.

In its Petition, Willson points out the following:

1. Moonbeam's amended application states that Ms. Constant lived in Santa Rosa, California, although it appears she never did, while attending college at Sonoma State University, Santa Rosa, California.
2. Moonbeam falsely reports in its amended application that Sonoma State University is located in Santa Rosa, within the 1 mV contour of Moonbeam's proposed station.
3. Moonbeam's Integration and Diversification Statement again falsely reports that Sonoma State University is in Santa Rosa, California but says nothing about Ms. Constant's purported past residence in Santa Rosa, referenced in its amended application.

Moonbeam in its one paragraph response to the substantive allegations on these points raised by Willson states, "[T]here can be no question that at most Ms. Constant inadvertently

A little background will shed some light on Moonbeam's motive to misrepresent. When Willson filed his 301 application, he reported that he intended to be integrated and reported that he would claim credit under local residency by virtue of business ownership within the 1 mV contour of his proposed station. At the time, there was a preference awarded for female ownership which, of course, would benefit Moonbeam and not Willson. However, by the time the March 2, 1992 B-cutoff date arrived, the female preference had been eliminated. See Lamprecht v. FCC, No. 88-1395, 70 RR2d 650 (DC Cir. Feb. 19, 1992). Moonbeam then had

The Commission has recently time and again expressed its concern regarding misrepresentations in cases involving even non-decisional matters. In Frank Digesu, 7 FCC Rcd. 5459 (1992), the Commission remanded the proceeding to explore whether one of the applicants had mischaracterized her past broadcast experience. Past broadcast experience is generally even less important than local residency. See also, Gulf Breeze Broadcasting Company, ___ FCC Rcd. ___ (Rev. Bd. March 18, 1993).

In Raymond J. and Jean-Marie Strong, 6 FCC Rcd. 5321 (Rev. Bd. 1991), the Review Board remanded and added a misrepresentation issue which had been denied by the ALJ. In that proceeding, an applicant made a false statement in an amendment concerning her employment. The applicant contended there was no intention to deceive in the amendment since she was not claiming any broadcast experience and that, therefore, there was no motive to dissemble as to her employment at another radio station. The Review Board added the issue, noting that, "The Court has admonished the Commission against avoiding a full evidentiary hearing 'when it is shown a good deal of smoke'" [citations omitted]. Id. at ¶9. See Wayburn Broadcasting Limited Partnership v. FCC, No. 91-1383, 71 RR2d 1386 (DC Cir. 1993)(remanded to explore misrepresentation issues which should have been added).

Moonbeam cites dated, inapposite precedent to support its position. It cites Garrett, Andrews and Letizia, Inc., 86 FCC2d 1172 (Rev. Bd. 1981) to support its position but inaccurately describes the case holding. Moonbeam states, "The Commission there rejected the slight comparative enhancements for residence

in the proposed city of license since it was not persuasive evidence of motive to misrepresent facts." Opp. at n. 2. However, in denying the issue, the FCC first found there was no misrepresentation concerning residency and, secondly, held there was no motive due to the opposing applicant's "decisive quantitative integration advantage" (emphasis added). Id. at 1177. Here, both applicants propose 100 percent quantitative integration and there appears to be prima facie misrepresentation concerning past local residence.

Moonbeam also cites Intercontinental Radio, Inc., 98 FCC2d 608, 639 (Rev. Bd. 1984). There, a misrepresentation issue was denied because there was no intent to deceive. Accurate log information which conflicted with exhibits was voluntarily provided by the applicant before the petition to enlarge was filed. Willson also notes that the precedent he cites in his Petition (i.e., San Joaquin Television Improvement Corp., 2 FCC Rcd. 7004, 7005, ¶8 (1987); Richardson Broadcasting Group, 7 FCC Rcd. 1583 (1992); and in this Reply) is far more current and controlling. Indeed, the Commission has noted, "Although the Commission in some circumstances has shown leniency toward applicants that have been less than candid, more recently, 'the Commission's demand for absolute candor [has] itself [been] all but absolute.' Emission de Radio Balmeseda, Inc., 7 FCC Rcd. 3852, 3588 (Rev. Bd. 1992)" [other citations omitted] Maria M. Ochoa, 7 FCC Rcd. 6569 (Rev. Bd. Oct. 13, 1992). Moonbeam fails to even address the recent Richardson case which specifically deals with misrepresentations concerning residency.

B. Employment.

Willson submitted the declarations of three individuals who were all advised that Mary Constant was not and is not employed by James Warren & Sons in St. Helena, California as she claims. In opposition, Moonbeam submits the declaration of Casey Escher, the broker in charge of the St. Helena office for James Warren & Sons, who claims that Ms. Constant has since February 1992 has "been considered an associate realtor of James Warren & Sons." Despite the fact Ms. Constant submitted a declaration, she says nothing about her "employment" with James Warren & Sons.

Substantial and material questions remain concerning Ms. Constant's employment. First, she has said nothing about her employment. This is peculiar at the very least since she is in the best position to speak to her employment as an associate real estate agent. The only evidence presented, the declaration of Casey Escher, raises more questions by what is not said. He states only that Ms. Constant has "been considered an associate realtor" since February 1992. There is no mention whether she has ever been in the office, how many hours she works, if at all, nor is any other relevant information provided. By contrast, Willson has presented the declarations of three individuals who have all been advised by James Warren & Sons that Ms. Constant is not employed by the company. Also, documentation provided by the California Department of Real Estate reveals that James Warren & Sons, Inc. in St. Helena, California has seven employees. Mary

Constant is not listed. See Exhibit 1.¹ There is a material question whether Ms. Constant is in fact employed and, even if she is, whether the employment exists in name only as a convenience to make it appear she has some connection with the service area.

Moonbeam addresses most of its attack on this issue on procedural grounds claiming Willson's evidence is hearsay and should be rejected. It cites three cases decided 10 to 15 years ago to support its position. It is well settled that administrative adjudications may consider relevant material hearsay. Richardson v. Perales, 402 U.S. 389, 402 (1971). In Johnson v. United States, 628 F2d 187, 190 (DC Cir. 1980), the Court noted, "Not only is hearsay admissible, but under the appropriate circumstances, it may constitute substantial evidence." The Review Board has noted this fact of law and has observed that the weight to be accorded hearsay "depends on its truthfulness, reasonableness, and credibility" and that "a prime indicium of probity is whether the declarants are disinterested witnesses."

to explore whether Moonbeam's so called employment misrepresents her true relationship, if any, with the realty company.

C. Timeliness.

Moonbeam devotes the bulk of its opposition not to the substantive issues, but to procedural matters. Moonbeam argues that Willson's Petition should be dismissed as untimely despite the fact: (1) the Petition was filed within 15 days of newly discovered evidence, (2) that it was filed nearly 3 months before the scheduled hearing in this proceeding, (3) that it was filed over one month before scheduled depositions in this proceeding, and (4) that it was filed less than 3 weeks from the date for filing petitions to enlarge as a matter of right.

Willson timely filed his Petition. The Petition was filed within 15 days of receipt of Moonbeam's Integration Statement. That Integration Statement contained information critical to Mr. Willson's Petition. Moonbeam repeated its employment claim, as well as Ms. Constant's connection with Sonoma State purportedly located within the service area. This fact is central to Willson's argument because it undermines the very defense it turns out Moonbeam raises -- inadvertence. Furthermore, the Integration Statement indicates for the first time that Ms. Constant was never a resident of Santa Rosa as she claimed in an amendment filed with the Commission. Moonbeam's arguments, therefore, are not well founded -- as a matter of fact or law.

Moonbeam cites Great Lakes Broadcasting, Inc., 6 FCC Rcd. 4331 (1991). There, on facts totally different from those at issue here, a petition to enlarge filed after an initial decision

had been rendered and based on no newly discovered evidence was found untimely. Moonbeam then cites a nearly 30 year old case, KWEM Broadcasting Company, 1 FCC2d 1605 (Rev. Bd. 1965), where a petitioner waited 11 months to determine whether a competing applicant's unemployment was ongoing in nature, and whether the applicant would inform the Commission of the change. Again, the petition in that case was filed over one year after issuance of

D. Conclusion.

Moonbeam has admitted that the information it provided concerning the location of Sonoma State University within the service area and the explicit local contact this communicated was false. It is apparent on the face of the evidence presented that Moonbeam misrepresented Ms. Constant's local residency in Santa Rosa in its March 2, 1992 amendment. Significant and material questions have also been raised concerning Ms. Constant's employment within the service area. Ms. Constant herself says nothing about her employment, California State records indicate she is not an employee, and, it appears, if there was any relationship with the realty office, it was made to create an impression of involvement in the service area which did not exist. There is also an ongoing clear cut motive for making these misrepresentations.

WHEREFORE, it is respectfully requested that Willson's Petition to Enlarge Issues be granted.

Respectfully submitted,

GARY E. WILLSON

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By 
A. Wray Fitch III
His Attorney

May 20, 1993

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PRINT PUBLIC INFORMATION REQUEST

CORPORATION JAMES WARREN & SON INC
01096919 1414 MAIN ST
SAINT HELENA, CA 94574

LICENSED

EXPIRATION DATE: 12/02/94

FORMER NAME(S):

*** NO FORMER NAMES ON FILE ***

MAIN OFFICE:

1414 MAIN ST
SAINT HELENA, CA 94574

DBAS:

*** NO DBAS ON FILE ***

LICENSED OFFICERS:

** (DES. OFFCR) ** 00442236 - ESCHER, CASPAR HENRY JR
00333852 - WARREN, ROBERT
CANCELLED AS OF 02/19/91

EXP DATE
12/02/94

12/02/94

BRANCHES:

1209 NIEBAUM LN
RUTHERFORD, CA 94573

EMPLOYEES:

01070217 - ELLIOTT, REGINA DAWN
00820189 - ERICSON, GRETA IRENE
01022473 - KELSEY, JOHN ERNEST
00634315 - LOUER, ROGER B
00981449 - WARREN, JEFFREY EARL
00977239 - WELLS, CATHERINE MANGAN

COMMENTS:

*** NO PUBLIC COMMENTS ON FILE ***

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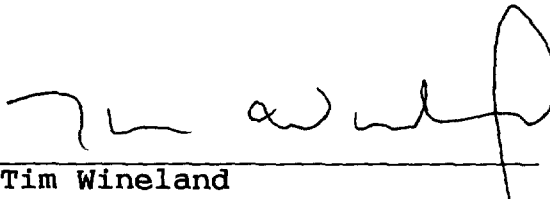
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, hereby certify that I have sent, this 20th day of May 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing REPLY TO OPPOSITION TO PETITION TO ENLARGE ISSUES to the following:

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Tim Wineland

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